

M. KENT HAFEN

IBLA 89-38

Decided May 7, 1990

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting application for desert land entry. N-21908.

Affirmed.

1. Desert Land Entry: Generally--Desert Land Entry: Water Supply

An irrigation plan that would transfer an existing water license from private farmland which has been subdivided for residential use in order to irrigate a desert land entry does not comply with provision of the Desert Land Entry Act requiring that an entryman provide a permanent and sufficient source of water to the desert entry.

2. Desert Land Entry: Generally--Desert Land Entry: Water Supply

When the Department reviews an irrigation plan pursuant to 43 U.S.C. § 327 (1982), it may consider whether a plan of irrigation is speculative and may reject a plan which is contrary to existing agricultural practices.

APPEARANCES: Charles Frederick Unmack, Esq., Carson City, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

M. Kent Hafen has appealed from a September 20, 1988, decision of the Nevada State Office, Bureau of Land Management (BLM), rejecting his desert land entry application N-21908. The land he seeks to enter, 320 acres in sec. 24, T. 21 S., R. 53 E., Mount Diablo Meridian, Nye County, Nevada, is located in the Pahrump Valley, north of Las Vegas. In response to an application made by Hafen, the tract was classified by BLM as suitable for desert land entry by a classification decision made on April 6, 1981. Nonetheless, BLM rejected Hafen's application to enter the land so classified because the water which Hafen proposed to use to reclaim the desert land is currently in use on other land owned by Hafen in the vicinity of the tract located in sec. 24.

The decision under review explains the reason for rejection as follows:

Departmental policy is outlined in Departmental Manual 600.2.1. This policy dictates that land will not be disposed of where to do so would endanger the supply of water for existing users or encourage dissipation of water reserves.

The only source of water to irrigate the land in this application is by the transfer of your existing permits from private land. The transfer of water rights from private land to public land to gain the benefit of provisions of the public land laws is not in the public interest.

(Decision at 2).

The provision of the Departmental Manual relied upon as authority for the action taken states:

.1 In many areas of the West existing water supplies are being used to capacity. In some places water is being "mined" from underground reserves far beyond annual replenishment. In the long run, disregard for the conservation of this vital national resource can only jeopardize existing water uses and limit future growth. The Department of the Interior recognizes the magnitude of the impact that Federal land management has upon the Nation's land and water resources. Such recognition in no way infringes on the obligations of the respective States and of citizens themselves to manage and conserve water resources.

* * * * *

.4 The Department of the Interior will conduct its public land management activities in a manner to promote the conservation of water supplies. In its land disposition programs, the Department will avoid actions which would endanger the supply of adequate water for existing users or encourage the unwise dissipation of water reserves.

(DM 600.2.1,4 (Oct. 9, 1972)).

On January 23, 1953, the Nevada State Engineer incorporated the township where this entry is located, T. 21 S., R. 53 E., into the Pahrump Artesian Basin, a designated underground artesian water basin. On June 1, 1970, he limited water appropriation in the Pahrump Artesian Basin because of an aquifer overdraft, as follows:

A review of the water rights of record as of May 1, 1970, confirms that appropriations have been approved for 45,607 acre-feet under certificated rights and 45,416 acre-feet under permitted rights which could legally make a total demand of 91,023 acre-feet of water per year within the designated area of the Pahrump Artesian

Basin. This condition results in an over-draft of water which will deplete the ground water reservoir.

* * * * *

Therefore, the safeguarding of the limited ground water supply within the aforementioned designated area of the Pahrump Artesian Basin necessitates and demands that irrigation use be excluded from the preferred uses of the ground water resources within the above described area and that no additional permits be allowed within this area to appropriate ground water for the irrigation of lands.

(State Engineer's Order dated June 1, 1970, at 2, 3).

Hafen proposed to incorporate the desert land sought to be entered into his pre-existing farm, and to transfer water rights no longer used on some of his privately owned farmland to the desert entry. His irrigation plan is described in correspondence between BLM and the State, which explained

regarding [Hafen's] potential source of water necessary to perfect the application, [Hafen] currently owns 1,290 acres of irrigated farm land located between 1-1/2 and 4 miles northeast of the subject public lands. [Hafen's] private lands are primarily in one block except for a 360 acre parcel which he has subdivided into 1.25 acre lots. [He] has a water right of 1800 acres for the subdivided parcel, and under the subdivision laws of the State of Nevada, he must reserve 2.02 acre feet per 1.25 acre lot. Therefore, [he] must reserve 581.76 acre feet of water for subdivision purposes with the remaining 1,218.24 acre feet being available for his [desert land entry]. This amount of water is sufficient to perfect his application.

(Letter dated Mar. 24, 1981, Conn to Morris).

Earlier, on March 22, 1979, the State Engineer of Nevada had commented, in reference to Hafen's irrigation plan, that:

This office sees no problem under the statutes of transferring portions of these water rights to other areas, as outlined in your letter, by filing proper applications. You are aware of course that applications to change are accepted in this office, but final determination can only be made after the advertising and protest period to the granting or denial of such applications.

(Letter dated Mar. 22, 1979, Newman to Hafen). The underground water rights for the property subdivided into residential lots are currently held by Tim Hafen Ranches, Inc., under Nevada Permits Nos. 28202, 22145, 19228, and 18316.

In the classification decision dated April 6, 1981, BLM found "the land classification is consistent with state and local government planning and zoning regulation." The classification decision found the land in sec. 24 to be suitable to "entry under the desert land laws" and "physically suitable or adaptable" to such usage. Following classification of the 320-acre tract in sec. 24, on January 6, 1983, Hafen applied to the State for transfer of his existing water right from his privately owned land to the desert land. He notified BLM that, pursuant to prior understanding between the State and BLM, his transfer application had now proceeded as far as he could take it, because availability of water for the entry in sec. 24 remained to be established by the State. Following further inquiry from Hafen in June 1988, BLM issued the decision of September 20, 1988, rejecting his application.

In his statement of reasons on appeal (SOR) Hafen argues that BLM's decision does not correctly apply the Desert Land Entry Act, 43 U.S.C. §§ 321-339 (1982). He points out, concerning the decision appealed from, that it rests on an "unstated legal conclusion * * * that prior [water] appropriations for desert-land entries must come from non-private land" (SOR at 5). This conclusion, he contends, cannot be derived from the Desert Land Entry Act because, so far as the Federal law is concerned, the source of water for an entry is immaterial, so long as it is sufficient to reclaim the land (SOR at 6, 7). The SOR explains:

The regulations implementing the [Desert Land Entry] Act recognize that an applicant may acquire water from "an irrigation district, corporation, or association." 43 C.F.R. Section 2521.2(d). But the regulations do not inquire into the source of water for these organizations or for any other appropriator. Nor does the BLM sequence of procedures call for investigating the source of the appropriation beyond the question of availability.

Id. at 7-8.

Hafen points out that an applicant for desert land entry must show that there has been a "bona fide prior appropriation" of water onto the tract claimed. 43 U.S.C. § 321 (1982). Hafen argues that the Act has been construed to recognize that state law governs the acquisition of water for reclamation of the public lands: the Federal Government disposes of desert lands under the Act, but authority over appropriation of water remains in the states, citing Nevada v. United States, 463 U.S. 110 (1983), and California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935). Following this line of reasoning to a conclusion, he contends that the source of water for an entry is immaterial to the Federal Government, which is not concerned about water rights, and that adjudication of the water question should be left entirely to the State. Finally, he argues that this Board has recognized that this approach is correct in Silvita S. Rouseau, 85 IBLA 46 (1985).

[1] It is correct that, as Hafen argues, while the Desert Land Entry Act requires that there be sufficient water to reclaim an entry, it does not specify the source from which the appropriation must be made, except

that it be from "lakes, rivers, and other sources of water supply upon the public lands and not navigable." 43 U.S.C. § 321 (1982). Water drawn from underground sources is included in the statutory reference to "other sources of water." State v. Dority, 225 P.2d 1007 (N.M. 1950), appeal dismissed, 341 U.S. 924 (1951). Water for entry of desert lands is available from the public domain. California Oregon Power Co. v. Beaver Portland Cement Co., supra at 162.

BLM's decision rejects Hafen's application for entry because his irrigation plan shows that Hafen intends to place land under irrigation by removing a corresponding quantity of existing agricultural land from irrigation. The effect of the plan proposed is, therefore, that there will be no increase in land brought under cultivation should the entry be allowed. Land formerly used for agriculture will have been shifted into residential use, and the unused water right resulting from that change in use will be transferred to the entry in sec. 24.

The Desert Land Entry Act requires that an entryman file a plan of irrigation with his entry application, which shall be subject to agency review. 43 U.S.C. § 327 (1982); 43 CFR 2521.2(d). In United States v. James M. Mills, 91 IBLA 370 (1986), we rejected an attempt by a desert land entryman to amend his plan of irrigation to permit transfer of water from irrigated privately owned land to a desert entry. Mills, the entryman, had proposed to BLM that he would increase the capacity of an existing irrigation system to obtain an additional 200 inches of water for his desert entry. At the time of proof, however, it became apparent that he had not increased his system as proposed. He then attempted to amend his irrigation plan to allow him to transfer the existing water right from his privately owned land to the desert entry. We rejected this approach, stating:

Appellant's contention now advanced, that he is entitled to use all or a portion of the water licensed to his deeded land to also irrigate his desert entry, does not establish compliance with the law. * * * water which is being diverted from its natural course to desert land must be for the specific purpose of irrigating the lands embraced in the desert land entry to be served. See e.g., United States v. Swallow, 74 I.D. 1 (1967). The desert land entry would not have been allowed by BLM if appellant had declared his intent to irrigate the land with water diverted from the water right appurtenant to his deeded land * * *. The regulation requiring an adequate supply of water for the desert land entry is interpreted by BLM to prohibit reliance on a water right appurtenant to other lands, unless there is a legal commitment of that water from the other lands for use on the entered lands * * *. [A] BLM employee explained that the water committed to appellant's deeded land would not be available for the desert land entry if someone other than appellant owned the deeded tract * * *. The significance of this conclusion was underscored by the testimony of George Astle, who leased the deeded tract from appellant in 1977 through 1980, and who had

obtained an injunction in 1980 to retain enough water for use on the deeded land under lease. [Citations omitted.]

United States v. Mills, *supra* at 376-77. Concerning the issue raised when Mills sought to amend his irrigation plan, we found that the Desert Land Entry Act requires that an entryman provide a permanent sufficient source of water for his desert entry, and concluded that the use of water held by a third party under agricultural use licensed on privately owned land does not satisfy the statutory requirement. *Id.* at 375.

This issue received further review on subsequent appeals by the same entryman. See United States v. James M. Mills (On Reconsideration), 94 IBLA 59 (1986), and James M. Mills, 108 IBLA 155 (1989). The proposal made here by Hafen is essentially the same proposal made by Mills: to transfer an existing license from a private tract to obtain an entry to desert land. In this case, as in Mills therefore, there is no water available for sec. 24 from such a proposal. There has been no water to permit an increase in agricultural irrigation in the valley since June 1, 1970, when the State Engineer declared an aquifer overdraft in the Pahrump Basin. The fact that there are permits currently in existence for other lands in the vicinity which are available to Hafen through his corporation does not change that fact. Here, as was the case in Mills, BLM has refused to approve the irrigation plan because the statute "is interpreted by BLM to prohibit reliance on a water right appurtenant to other lands." Because such a plan reveals that there is not a permanent sufficient source of water for the desert entry, the entry as proposed cannot be allowed. United States v. James M. Mills, *supra*.

[2] BLM may consider whether a plan of irrigation is "unorthodox or speculative" and may reject a plan "which is completely out of step with prevailing or existing agricultural practices in the area." United States v. Swallow, 74 I.D. 1, 5 (1967). The plan proposed by Hafen in this case was designed to remove agricultural land from production by dividing it into residential tracts and to transfer whatever water rights remained after subdivision to the desert entry in sec. 24. BLM was not obliged to close its eyes to the speculative purpose of the proposed entry, but could properly adjudicate questions raised by the proposal on their merits. *Id.*; see also Williams v. United States, 138 U.S. 514 (1891).

While conceding that an applicant for desert land entry must show that there has been a "bona fide prior application" of water onto the tract claimed, Hafen contends that whether he has done so or not is a question of State law, and that only Nevada should be allowed to pass on this question. He argues, further, that we have given tacit prior recognition to this hands-off approach to the question of water rights by our decision in Silvita S. Rousseau, *supra*.

In Rousseau we were confronted with an amendment to a Nevada desert land entry application made on appeal to this Board. While we expressed doubt that the amendment would have been sufficient to entitle the application to favorable consideration by BLM had it been first presented with the proposal, for "administrative economy" we set aside BLM's decision and

remanded the case file so that BLM might consider the amended application. The source of water identified in the amended application filed by Rousseau with the Board was "a well on her property adjacent to the tract which she now seeks to enter." Id. at 47.

We did not, therefore, find that Rousseau's application was proper, only that it had not been considered by BLM. Under the circumstances, it was expedient to remand the matter to BLM to permit the application to be first evaluated by the agency obliged to make the initial determination concerning feasibility of the irrigation plan offered, especially where that plan, while unclear, had been changed in a material way. Nothing in Rousseau should be read to contradict in any way our holdings in the Mills cases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Nevada State Office is affirmed. 1/

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

1/ Whether this application may be affected by pending litigation in National Wildlife Federation v. Burford, 878 F.2d 422 (9th Cir. 1989), cert. granted, 58 U.S.L.W. 3443 (Jan. 16, 1990), is not shown by the case file: it does not appear that, in this case, there was a termination of a classification in effect on Jan. 1, 1981, so as to bring this matter within the scope of the National Wildlife Federation litigation. See James A. Malesky (On Reconsideration), 106 IBLA 327 (1989).